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Before the
Federal Communications Commission
DISPATCHED BY Washington, D.C. 20554

In the Matter of)

)
Amendment of Part 2, Subpart K of the
Commission's Rules regarding the Importation
of radio frequency Devices Capable of Causing
Harmful Interference)

CI Docket No. 98-69

ORDER
AND
NOTICE OF PROPOSED RULE MAKING

Adopted: May 18, 1998

Released: June 5, 1998

Comment Date: (30 days after publication in the Federal Register)

Reply Comment Date: (45 days after publication in the Federal Register)

By the Commission:

I. Introduction

1. In this Order, we change the delegation of authority to waive the radio frequency device importation rules from the Chief, Compliance Division of the Compliance and Information Bureau to the Chief, Office of Engineering and Technology. In the Notice of Propose Rulemaking (NPRM), we are proposing to change the administration of the radio frequency device importation rules by deleting the requirement for filing an original FCC Form 740 with the Commission when that form is used to make the required declaration upon importation of a radio frequency device. Also in the NPRM, we are proposing to amend the rules to clarify the language regarding importation for export of a radio frequency device to make the rule more easily enforceable and to address concerns raised by the U.S. Customs Service. The concerns expressed by Customs all relate to the difficulty that our two agencies have in enforcing this aspect of the FCC importation criteria.

II. Background

2. The radio frequency device importation rules are intended to prevent harmful interference by preventing entry of devices into the United States that do not comply with the FCC equipment authorization requirements. Pursuant to Section 302 of the Communications Act, 47 U.S.C. § 302a, the Commission adopted rules for marketing radio frequency devices in 1970.¹ These rules are designed to control sale, offer for sale, and importation for sale of devices that have a potential for causing

¹ 47 C.F.R. §§ 2.801 - 2.815.

interference.² In 1976 the Commission adopted procedures developed in consultation with the U.S. Customs Service (Customs) "to further implement the cooperative operation of enforcing the importation requirements." *See generally* 59 FCC 2d 1083 (1976) (Order adopting the original importation requirements). Among the prescriptions was a requirement to file with the Commission a declaration that imported radio frequency devices conformed to the FCC equipment authorization requirements. The means for making the declaration was FCC Form 740; the original was filed with the Commission and a copy accompanied the documentation presented to Customs. The rules provided for several exemptions which include, *inter alia*, (1) devices imported in limited quantities for testing and evaluation,³ (2) devices imported in limited quantities for demonstration at trade shows,⁴ and (3) devices imported solely for export.⁵ Devices meeting the requirements for these exemptions could be imported under bond according to U.S. Customs Service procedures for such bonds.

3. In 1991, the Commission revised the radio frequency device importation rules to eliminate unnecessary reporting and adjust to the U. S. Customs Service's transition to an electronic filing system.⁶ At that time the requirement to file the original FCC Form 740 with the Commission was eliminated when importation documents were filed electronically with the U.S. Customs Service. It was anticipated that there would be a transition period eventually resulting in total electronic filing by importers. Other changes included eliminating the bond requirement because the applicable Customs bond was dropped, defining the "limited quantities" that could be imported for testing, evaluation or demonstration at trade shows, and authorizing Chief, Enforcement Division of the Field Operations Bureau⁷ to issue waivers of the maximum number of units imported under the "limited quantities" provisions. The rules also retained the provision for importation of devices solely for export.⁸

III. Discussion

A. Waivers

4. As the Office of Engineering and Technology (OET) administers the radio frequency device marketing program, which includes issuing equipment authorizations, it is appropriate that OET should decide whether the importation rules should be waived for certain devices and that CIB should focus on enforcement of those rules. *See* 47 C.F.R. §§ 0.31(i), § 0.111(a). We are, therefore, reassigning to OET the responsibility to oversee issuance of waivers of the rules as to the maximum numbers of units that can

² *See* 47 C.F.R. § 2.803.

³ 47 C.F.R. § 2.1204(a)(3) (formerly 47 C.F.R. § 2.1207).

⁴ 47 C.F.R. § 2.1204(a)(4) (formerly 47 C.F.R. § 2.1207).

⁵ 47 C.F.R. § 2.1204(a)(5) (formerly 47 C.F.R. § 2.1209).

⁶ 6 FCC Rcd 3296 (1991).

⁷ The name of the Field Operations Bureau was changed to the Compliance and Information Bureau in 1994. We also note that the Chief, Enforcement Division, in the Field Operations Bureau is the predecessor of the Chief, Compliance Division in the Compliance and Information Bureau.

⁸ 47 C.F.R. § 2.1204(a)(5) (formerly 47 C.F.R. § 2.1209).

be imported under the exemptions. As this rule relates to agency organization, procedure or practice, no notice and comment is required and it becomes effective upon publication in the Federal Register.⁹

B. Filing Form 740

5. Since the advent of electronic filing with the U.S. Customs Service, the number of original FCC Forms 740 filed with the Commission has dramatically decreased — from 40,000 per month in 1990 to 800 per month in 1997. Conversely, the total number of declarations, made electronically to the U.S. Customs Service, however, has increased to 80,000 per month. This demonstrates the industry's ready acceptance of and strong desire to take advantage of electronic filing for purposes of submitting required importation declarations. There is a strong belief by the staff who have experience with administering these rules that the data entry validation aspect of the U.S. Customs Service electronic filing process has heightened importer awareness of the FCC requirements regarding radio frequency devices and that the increase in the number of declarations is a result of the electronic filing. Experience also shows, however, no tangible benefit obtained by the FCC from the requirement that an original FCC Form 740 be filed with the Commission when the filing with the U.S. Customs Service is not done electronically. All compliance related information, when needed by the FCC in individual cases, is readily obtained from the paper forms submitted to Customs as part of the overall Customs process. Having a duplicative form on file with the FCC simply adds no value to the process. We propose to eliminate the duplicative filing and require only that the original paper FCC Form 740 be submitted to Customs with other required non-electronic submissions. We seek comment on our proposal to eliminate the duplicative filing and require that only one Form 740 be filed and that it be filed with Customs. On a related note, as Customs has implemented its electronic filing system, the informational note in our rules anticipating the implementation of the electronic system is no longer needed and we are proposing to eliminate reference to the pending implementation of that system from the rules.¹⁰

C. Import for Export

6. Enforcement of the exemption for equipment imported solely for export has been problematic. The rule states that, "(a) [r]adio frequency devices may be imported only if one or more of these conditions are met: . . . (5) [t]he radio frequency device is being imported solely for export. The device will not be marketed or offered for sale for use in the U.S." 47 C.F.R. § 2.1204(a)(5). On occasion, organizations have engaged in the business of selling radio frequency devices that could not receive an FCC equipment authorization to alien visitors to this country. The visitors then return to their country with the device. Often the device is a type that cannot be imported in bulk into the foreign country, but can be imported one at a time for personal use. In these kinds of business transactions, it is not difficult for a U.S. citizen to present himself as an alien who intends to export the device, but who actually purchases it for domestic consumption. Enforcing the rules by establishing that the vendor sold an imported device for use in the U.S. is difficult. Under the current rules, there is no requirement that the seller verify where the device will be used. For some operations, there is a strong economic incentive to remain ignorant as to whether the device is purchased for use in the U.S. Thus, with minimal collusion between the vendor and the buyer, the rules can be easily violated, but it is very difficult to penetrate the ruse and collect evidence to enforce the requirements of the rules.

⁹ See 5 U.S.C. § 553 (b)(3)(A). (providing that rules of agency organization, practice, and procedure are exempt from notice-and-comment requirements of the Administrative Procedure Act).

¹⁰ See note to 47 C.F.R. § 2.1205.

7. When we adopted the exemption, we expanded it from our original proposal, after comment to include all devices imported solely for export. We recognized the existence of "[a] television broadcast receiver, which is designed to operate under standards in use in a foreign country, is typically not capable of receiving U.S. standard television broadcast signals, unless extensively modified." We then asserted,

It has come to the attention of the Commission that a number of devices, including such TV receivers, are imported for the purpose of sale to foreign individuals returning to their native country or to persons going abroad. . . . Inasmuch as they are apparently imported for the purpose of export and therefore do not present a potential source of interference, the Commission is inclined not to delete, but expand proposed Section 2.1207(b) to include all devices intended for export. In addition the proposed rule is modified to require the posting of a bond . . . ¹¹

8. Experience has shown this to be a very optimistic but incorrect analysis. The devices that are imported for this purpose tend to be precisely those devices to which we deny equipment authorization for use in the United States because they present a real source of interference. As presently written, this exemption presents a way for these devices to easily enter domestic commerce. The idea that sale of these devices could be controlled through an import bond was misguided, as our enforcement agents in their many close dealings with agents of the U.S. Customs Service have been repeatedly told that there is no bond for this purpose.¹²

9. We are proposing to delete the two words "for use" in Section 2.1204(a)(5) of the Rules, 47 C.F.R. § 2.1204(a)(5). With this change, we will close a "loophole" in the regulation and will make the importation constraint consistent with the constraints of U.S. manufacturers who, if they produce unapproved devices, must do so solely for export.¹³ Recognizing that the current rule provides an unintended means for unauthorized devices to enter this country, we seek comment on this change as a means of correcting the unintended circumstance.

IV. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

10. Appendix A contains an Initial Regulatory Flexibility Analysis (IRFA). As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. We also seek comment on the number of entities affected by the proposed rules that are small businesses, and request that commenters identify whether they themselves are small businesses. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Order and Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory

¹¹ 59 FCC 2d 1083, 1087 (1976).

¹² It should be noted that many of these collaborations with U.S. Customs Service agents are initiated by the U.S. Customs Service in a sincere desire to keep the devices out of domestic commerce. FCC and Customs Service agents work together in this effort using compliance measures that do not involve bonds.

¹³ See 47 U.S.C. § 302a (c).

Flexibility Analysis. The Office of Public Affairs, Reference Operations Division will send a copy of this Order and Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612 (1981).

B. *Ex Parte* Rules -- Non-Restricted Proceeding

11. This is a permit-but-disclose proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

C. Initial Paperwork Reduction Act of 1995 Analysis

12. This Order and Notice of Proposed Rule Making contains a modified information collection. The FCC, as part of its effort to reduce paperwork burdens, invites the general public and OMB to comment on the information collection requirements contained in this Notice of Proposed Rulemaking. Written comments by the public are due within 60 days after publication of this notice in the Federal Register. Comments should be submitted to Judy Boley, FCC, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov; and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 17th Street, N.W., Washington, DC 20503, or via the Internet to fain_t@al.eop.gov. For additional information, contact Judy Boley at 202-418-0214 or at above Internet address. The information collection requirements contained in the attached rules becomes effective following OMB approval.

D. Comment Dates

13. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before 30 days after publication in the Federal Register, and reply comments on or before 45 days after publication in the Federal Register. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. You may also file informal comments by electronic mail. You should address informal comments to demrick@fcc.gov. You must put the docket number of this proceeding on the subject line, CI Docket No. 98-69. You must also include your full name and Postal Service mailing address in the text of the message. Formal and informal comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

F. Ordering Clauses

14. Authority for issuance of this Order and Notice of Proposed Rule Making is contained in Sections 4(i), 4(j), 7(a), 302, 303(b), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 157(a), 303(b), 303(f), 303(g), 303(r).

15. Accordingly, IT IS ORDERED, that Part 2 of the Commission's Rules and Regulations IS AMENDED as set forth in Appendix B hereto, effective upon publication in the Federal Register.¹⁴

16. IT IS FURTHER ORDERED that the Notice of Proposed Rulemaking IS HEREBY ADOPTED.

17. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this NOTICE OF PROPOSED RULEMAKING, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act, *see* 5 U.S.C. § 605(b).

G. Contacts for Information

18. For further information, contact Dan S. Emrick, Compliance and Information Bureau (202) 418-1170 or via E-Mail to "demrick@fcc.gov".

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

Attachment

¹⁴ The rule amendments contained in Appendix B concern agency organization, practice, or procedure and will not have a substantial impact on substantive rights and interests. Compliance with the notice-and-comment requirements of the Administrative Procedure Act is therefore unnecessary. *See* 5 U.S.C. § 553(b)(3)(A).

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA),¹ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected economic impact on small entities by the policies and rules proposed in this Order and Notice of Proposed Rule Making (Notice). Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments in the Further Notice provided above. The Office of Public Affairs, Reference Operations Division will send a copy of this Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.²

I. Need For and Purpose of this Action:

1. This Notice reexamines the rules specifying procedures for importation of radio frequency devices. It seeks information that will assist the Commission in determining whether current rules can be simplified and made more easy to enforce. It will also reduce the administrative burden on both the Commission and the public.

II. Description and Estimate of Number of Small Businesses to Which Rules Will Apply:

2. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.³ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organizations," and "small governmental jurisdiction".⁴ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁵ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁶ The Commission will need to receive more data regarding the brokers who currently file Forms 740 with the Commission, rather than filing them electronically through the U.S.

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract with America Advancement Act of 1996 Pub. L. No. 104-121, 110 Stat. 847 (1996)(CWAAA). Title II of the CWAAA is "The Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA).

² See 5 U.S.C. § 604.

³ 5 U.S.C. § 603(b)(3).

⁴ *Id.*; 5 U.S.C. § 601(6).

⁵ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register. 5 U.S.C. § 601(3).

⁶ Small Business Act, 15 U.S.C. § 632 (1996).

Customs Service (Customs). We estimate that 800 of these forms are filed per month, presumably by smaller firms that do not subscribe to the Customs electronic filing system due to the relatively small number of FCC declarations that they handle. While there is no readily apparent link between the number of paper filings per month and the number of entities submitting the declarations, we presume most of the entities involved are small businesses or individuals. These entities will continue to be subject to the requirement to submit FCC Form 740 documents, but only to one government agency, not two. They will address and mail only one form per declaration, not two, thereby reducing at least their mailing cost by half. Other administrative costs, such as staff time required to complete the form, will also be significantly reduced.

IV. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements:

3. There will be no new requirements. The Notice proposes to eliminate the requirement to file a copy of Form 740 with the Commission for entities that do not use the Customs electronic filing procedures. Those entities will provide an original Form 740 to Customs with the shipment, but will not be required to file a second copy with the FCC.

V. Significant Alternatives and Steps Taken by Agency to Minimize Significant Economic Impact on a Substantial Number of Small Entities Consistent with Stated Objectives:

4. The impact of this Notice will be, by its nature, a reduction of the burden on small entities. For example, eliminating the duplicative filing of the Form 740 should reduce administrative overhead, such as processing and mailing costs for small businesses.

VI. Commission's Outreach Efforts to Learn of and Respond to the Views of Small entities pursuant to SBREFA 5 U.S.C. §609:

Report to Congress: The Commission will send a copy of this Order and Notice of Proposed Rulemaking, including this Final Regulatory Flexibility Analysis, to Congress pursuant to the Small Business Regulatory Enforcement Act of 1996, 5 U.S.C. § 801(a)(1)(A). A summary of the Order and Notice of Proposed Rulemaking and this FRFA will also be published in the Federal Register pursuant to 5 U.S.C. § 604(b), and it will also be sent to the Chief Counsel for Advocacy of the Small Business Administration.

Appendix B

Rule Amendments

Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

**Part 2-FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES
AND REGULATIONS**

1. The authority citation for Part 2 is amended to read as follows:

AUTHORITY: 47 U.S.C. 154, 302, 303 and 336, unless otherwise noted.

2. Section 2.1204 is amended by revising paragraph (a)(3)(iii) and paragraph (a)(4)(iii) to read as follows:

§ 2.1204 Import Conditions

(a)***

(3)***

(i)***

(ii)***

(iii) Prior to importation of . . . written approval must be obtained from the Chief, Office of Engineering and Technology.

(iv)***

(4)***

(i)***

(ii)***

(iii) Prior to importation of . . . written approval must be obtained from the Chief, Office of Engineering and Technology. ***

Appendix C

Proposed Rule Amendments

Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 2-FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation for Part 2 is amended to read as follows:

AUTHORITY: 47 U.S.C. 154, 302, 303 and 336, unless otherwise noted.

2. Section 2.1204 (a)(5) is amended by revising the second sentence to read as follows:

§ 2.1204 Import Conditions

(a)***

(5)*** The device will not be marketed or offered for sale in the U.S.

3. Section 2.1205 is revised to read as follows:

§ 2.1205 Filing of required declaration.

(a) Submit the following information to Customs when filing the entry documentation and the entry summary documentation electronically. Follow procedures established by Customs for electronic filing.

(1) The terms under which the device is being imported, as indicated by citing the import condition number specified in § 2.1204(a);

(2) The FCC identifier as specified in § 2.925, if the device has been granted an equipment authorization;

(3) The quantity of devices being imported, regardless of what unit is specified in the Harmonized Tariff Schedule of the United States; and

(4) A commercial product description which is to include the trade name, a model/type number (or model/type name) and other descriptive information about the device being imported.

(b) For importers unable to participate in the electronic filing process with Customs for good cause, use FCC Form 740 to provide the information required in paragraph (a) and attach it to the Customs entry papers.